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No. 95-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THEODORE H. FRIEDMAN,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

THE CONFLICTS ARE REAL

The respondent acknowledges, albeit grudgingly, that the circuits disagree on the standards for disbarment of lawyers by federal courts in reciprocal discipline cases. Respondent describes it as a "weak split" (Br. in Opp. 11) without explaining how the "strength" of a conflict is to be

measured and why its alleged "strength" or "weakness" is in any manner relevant. Determining whether there is a circuit conflict is not a matter of degree.

A. Local Rule 4(g) Conflicts with Decisions of Other Circuits and of this Court. — The local rule of the Southern District of New York — emulated *in haec verba* or in substance in many other federal jurisdictions (see Pet. App. 88a-91a) — instructs district courts automatically to discipline an attorney who has been subjected to state discipline unless he provides "clear and convincing evidence" to the contrary. The Tenth and Eleventh Circuits, in *In re Phelps*, 637 F.2d 171, 176 (10th Cir. 1981), and in *Greer's Refuse Servs., Inc. v. Browning-Ferris Indus.*, 782 F.2d 918, 921 (11th Cir. 1986), permit federal discipline only after the federal court has "independently" examined the state court's record and grounds for imposing discipline — thereby precluding automatic disbarment. *Phelps* expressly rejected any presumption of correctness for the state-court action. Here, there was no independent examination of the state-court record, which was not even physically before the district court. The procedure followed in this case and the judgment imposed by the courts below would simply not be possible in the Tenth or Eleventh Circuits.

The rule applied in those Circuits does not require federal courts to "sift through the mammoth record" in reciprocal-discipline cases, as the respondent asserts (Br. in Opp. 13). Nor does it authorize consideration of issues "not specifically called to the court's attention by the accused attorney" — another of the respondent's extreme mischaracterizations of our position (Br. in Opp. 12). We recognize that the disciplined attorney has the burden to come forward in federal court and specify the flaw or flaws in the state disciplinary proceeding. But once he does so, as petitioner did, the evidentiary burden is on those seeking to

discipline him to meet the standard consistently applied in federal courts.

This Court's cases emphasize the distinctiveness of the federal district court bar and require the federal court to exercise an independent disciplining authority before disbarring an attorney. That is the clear lesson of *In re Ruffalo*, 390 U.S. 544, 547 (1968), and *Theard v. United States*, 354 U.S. 278, 281 (1957).

Respondent contends that the "clear and convincing" standard of the challenged district court rule is justified by this Court's statement in *Selling v. Radford*, 243 U.S. 46, 50-51 (1917), that a federal court should reject a state-court's discipline if the federal court has a "clear conviction" that the state-court's factual conclusion is erroneous (Br. in Opp. 17). But the quoted language does not support the respondent's interpretation. This Court said in *Selling* that "an *intrinsic* consideration of the state record" must first be conducted (243 U.S. at 50, emphasis added), and that only after such a consideration may the federal court (or the Supreme Court) discipline the attorney unless the state's factual conclusions are deemed erroneous under the quoted standard. That is a far cry from accepting the state court's determination unless the disciplined attorney proves his case by clear and convincing evidence — the standard of Rule 4(g) of the Southern District of New York.

B. The Failure to Require Clear and Convincing Proof to Support Disbarment Conflicts with Decisions of Other Circuits. — Respondent declares that "*virtually* all" the precedents petitioner cites for the proposition that disbarment in federal courts requires proof by clear and convincing evidence are "original disciplinary proceedings in federal court" rather than reciprocal-discipline cases. Indeed, respondent claims that "[n]ot one" of our cases

"even addresses . . . the standards in reciprocal discipline cases which originate in the state courts" (Br. in Opp. 19). But *In re Phelps, supra,* which the respondent conveniently ignores, was a reciprocal-discipline case in which the court of appeals permitted federal discipline only if the proof of culpability met the clear-and-convincing standard.

Even if the directly conflicting holding of *Phelps* is disregarded, respondent does not explain why the many federal decisions holding the clear-and-convincing standard applicable to federal disbarment proceedings are inapplicable to reciprocal disciplinary cases. This Court has insisted that federal courts' authority over their bars is independent of the state courts. It follows that federal courts may not uncritically apply a state-court disbarment decision that does not satisfy the standard of proof that would govern if the federal court were imposing discipline in the first instance. That is why respondent can cite no reported decision other than this one in which a federal court has disbarred or indefinitely suspended an attorney against whom charges have never been proved by clear and convincing evidence.

Respondent's reliance on the Seventh Circuit's recent decision in *In re Palmisano*, 70 F.3d 483 (7th Cir. 1995), is completely misplaced. Respondent implies that *Palmisano* holds that application of the clear-and-convincing standard of proof is not required in reciprocal discipline cases. But the Seventh Circuit did not even consider that issue in *Palmisano*, because the state court *had applied* the clear-and-convincing standard, and the facts were undisputed. *See* 70 F.3d at 486. The Seventh Circuit held only that the beyond-a-reasonable-doubt standard is not required for disbarment — a proposition no serious litigant contests. To the extent the Seventh Circuit's opinion might be read to suggest that the clear-and-convincing standard is not required in federal disbarment proceedings, any such suggestion is pure dicta

and contradicts the Seventh Circuit's long-established precedent. *In re Fisher*, 179 F.2d 361 (7th Cir.), *cert. denied*, 340 U.S. 825 (1950). If anything, the *Palmisano* court's observations on the standard of proof, which are seemingly inconsistent with (1) the Fifth Circuit's holding in *In re Medrano*, 956 F.2d 101 (5th Cir. 1992), (2) the Tenth Circuit's holding in *In re Phelps*, *supra*, (3) the Seventh Circuit's own decision in *Fisher*, *supra*, and (4) the other decisions cited in our petition, are a further indication of the need for guidance from the Court on this issue.[1]

II

THE ISSUES ARE IMPORTANT

On the one hand respondent asserts that the standard of the challenged Rule 4(g) is in widespread use and is supported by the ABA Model Rules of Disciplinary Enforcement. On the other hand, respondent asserts that the validity of the Rule is unimportant (Br. in Opp. 16-18). These are contradictory propositions, and both cannot be true. If, as we have shown, there are circuits that have rejected imposing such a burden of proof on an attorney, and if that burden is specified by the rules of numerous district

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[1] Respondent erroneously asserts that *Steadman v. SEC*, 450 U.S. 91 (1981), and *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), rejected the clear-and-convincing standard of proof in like circumstances. This Court concluded in *Steadman* that because Congress had mandated use of the preponderance standard in formal adjudications under the Administrative Procedure Act, the courts were not free to choose a different standard. In *Huddleston*, the Court considered the proper standard of proof for a civil damages action, in which the balance of interests is decidedly different than in a disciplinary proceeding affecting an individual's livelihood.

courts, the validity of the burden presents an important question.

Nor is it true that this Court declined to address any of the issues presented by this petition when it denied certiorari in *In re Friedman*, 115 S. Ct. 81 (1994). The issue presented at that juncture was whether an attorney could constitutionally be disbarred by a *state* court with less proof than meets the clear-and-convincing standard. That is a different issue than the questions presented at this stage, when the Court is considering what standard of proof is required for a federal disbarment, and whether a federal court should routinely and automatically follow the state court's disciplinary lead.

Finally, the respondent argues that "uniformity of attorney regulation" is not required in the federal courts and that each federal bar should be able to regulate its own membership according to its own standards (Br. in Opp. 21). Whether this should, indeed, be the law — thereby subjecting attorneys to different disciplinary standards in federal courts across the country — is surely an important question that deserves the attention of this Court. It appears to conflict with the decisions of this Court in *Ruffalo* and *Theard*, which articulated and applied a distinct federal standard and did not suggest that federal district courts were at liberty to utilize varying standards of proof. Indeed, respondent's position is at odds with the very decision on which respondent purports to rely. In *Frazier v. Heebe*, 482 U.S. 641 (1987), the Court emphasized the importance of exercising its inherent supervisory authority to ensure the fairness and consistency of district court rules.

III

USE OF FORECLOSED ALLEGATIONS WAS IMPROPER

Respondent does not try to defend the district court's imposition of further discipline based on the allegations in the *Mowen* case, which were the basis of a censure issued by the district court even before the state disbarment proceedings began and which were explicitly precluded from future use in "other proceedings."[2] Respondent asserts that the charges relating to the *Krieger* case were so serious that petitioner's suspension may be sustained on that basis alone, and respondent claims that the procedural issues raised would make no conceivable difference to the resolution of those charges.

But the state court's rationale for disbarring petitioner rested, according to repeated statements made by the court, on both the *Mowen* and *Krieger* violations. The Appellate Division asserted that its conclusion was based on what it called a "pattern of professional misconduct persisted in . . . for at least a decade" (Pet. App. 37a) — a characterization impossible to support if the *Mowen* charges are disregarded. Only in reliance on this "pattern" did the appellate court take the unusual step of increasing the sanction of a two-year suspension recommended by the referee.

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[2] Respondent insists mistakenly on calling this resolution a "plea bargain." In fact, it reflected the conclusion of the district court grievance committee that the one *Mowen* charge that petitioner had freely admitted from the outset of the grievance proceedings (*i.e.*, that an affidavit he had submitted to the court should have indicated that certain matters stated were matters of belief rather than actual knowledge) was the *only* allegation sufficiently supported by the evidence, and that the more serious charges were not sustainable.

More importantly, respondent overlooks the fact that only one of the *Krieger* charges was identified by the New York state court as being serious enough to require disbarment rather than the suspension recommended by the referee. That charge — subornation of perjury — was not only one of the most factually contested issues in the case, but it was also the allegation on which petitioner had previously been *acquitted* in a criminal trial turning on proof beyond a reasonable doubt.[3] Thus, the one charge on which petitioner's disbarment rests (if, as both respondent and the Second Circuit conceded, the *Mowen* charges may not be considered) is the one charge where the standard of proof was demonstrably dispositive.

In this case, petitioner was disbarred even though the Southern District's grievance committee and its investigating attorney, in 1984-86, and a 12-person state-court jury in New York, in 1988, had reviewed the charges against him and found them lacking, simply because a single state-court referee later found otherwise on the same body of evidence by applying a mere preponderance standard of proof. Respondent's glib assertion that the issues raised by

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[3] The remaining *Krieger* charges were much more technical and less serious. They included, for example, (1) the charge that a witness had been paid $250 for his time testifying when his daily earnings were only $150, (2) the charge that petitioner failed to correct a witness who testified falsely on cross-examination that the sportcoat he was wearing had not been purchased for him, and (3) the charge that petitioner had inadequately supervised an investigator and entered into a so-called "fee splitting" agreement with the same investigator. (The agreement actually provided that the investigator would receive one-half his hourly fee at the time services were performed and the remainder in the event of a judgment for petitioner's client.) Whether petitioner's conduct in these areas was unethical was vigorously contested, with petitioner presenting expert testimony from Professor Geoffrey Hazard, the Reporter of the ABA Model Rules of Disciplinary Enforcement, that his conduct was proper.

petitioner are merely academic and that his disbarment would be a foregone conclusion regardless of the procedural protections afforded him are belied by the record and by the history of this case.

CONCLUSION

Petitioner's professional life has been extinguished on the basis of preponderance-of-the-evidence findings made in a state proceeding after a sharply contested hearing. This is the archetypal case of a factual record on which the burden of proof makes a dispositive difference. If the correct federal standard had been applied, petitioner would not have been disbarred.

For the foregoing reasons and those set forth in our petition, a writ of certiorari should be granted.

Respectfully submitted,

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